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IN THIS ISSUE

(CLICK CASE NAME TO GO TO TEXT.)

CRIMINAL LAW ISSUE

SIMMONS v. STATE, No. 48A05-0112-CR-565, ___ N.E.2d ___ (Ind. Ct. App. Aug. 6, 2002).
BARNES, J.

Simmons contends the statutory requirement that one convicted of a felony OWI charge with at least two prior OWI convictions must serve at least six months imprisonment, enacted in 1996, was essentially repealed by a 1999 statutory enactment stating that upon a third OWI conviction, a trial court shall order that the person be imprisoned for at least ten days. . . .

. . . In 1996, the General Assembly amended the General Suspension Statute by adding subsection (b)(4)(Q), so that it reads as follows:

> (b) With respect to the crimes listed in this subsection, the court may suspend only that part of the sentence that is in excess of the minimum sentence:
>
> * * * * *
>
> (4)The felony committed was:
>
> * * * * *
>
> (Q) an offense under IC 9-30-5 (operating a vehicle while intoxicated) and the person who committed the offense has accumulated at least two (2) prior unrelated convictions under IC 9-30-5 . . . .

The minimum sentence for a Class D felony is six months. [Citations omitted.] [Footnote omitted.] Indiana Code Section 35-38-2.6-1(b)(3) precludes a defendant's placement in a community corrections program for the nonsupsendable portion of his or her sentence if he or she has committed one of the crimes listed in Section 35-50-2-2(b)(4). Therefore, the trial court here correctly determined that if six months of Simmons' sentence was

nonsupsendable under Section 35-50-2-2(b)(4)(Q) because of his prior OWI convictions, he could not be placed in a work release program for those six months.

In 1999, the General Assembly substantially rewrote Indiana Code Section 9-30-5-15. Among other changes, it added a new subsection (b), which provides:

> In addition to any criminal penalty imposed for an offense under this chapter, the court shall:
>
> (1) order:
>
> (A) that the person be imprisoned for at least ten (10) days; or
>
> (B)the person to perform at least sixty (60) days of community restitution or service; and
>
> (2) order the person to receive an assessment of the person's degree of alcohol and drug abuse and, if appropriate, to successfully complete an alcohol or drug abuse treatment program, including an alcohol deterrent program if the person suffers from alcohol abuse;
>
> if the person has at least two (2) prior convictions of operating while intoxicated.

Simmons argues that the effect of this 1999 amendment was to repeal the 1996 amendment to the General Suspension Statute by reducing the minimum mandatory period of incarceration for one convicted of at least his or her third OWI felony offense from six months to either ten days or sixty days of community restitution or service (which is not incarceration at all). Although we agree the two statutes may initially appear inconsistent, we conclude they can be rationally harmonized.

. . . .

Consider the following scenario. In 1996, a defendant is convicted of OWI, a misdemeanor under Indiana Code Section 9-30-5-2. In 1998, the same defendant is again convicted of OWI. Because of the other OWI conviction within the previous five years, the defendant is found guilty of a Class D felony pursuant to Indiana Code Section 9-30-5-3. In 2002, the defendant is yet again convicted of OWI; again, because of the previous OWI conviction in the last five years, he may be convicted of a Class D felony. Under Indiana Code Section 35-50-2-7(b), however, the trial court may decide to enter judgment for this offense as a Class A misdemeanor. Although this is the defendant's third OWI conviction, the nonsuspendability provision of Indiana Code Section 35-50-2-2(b)(4)(Q) is inapplicable, because by its express terms it only governs sentences for felonies. [Footnote omitted.] Under Indiana Code Section 35-50-3-1, the trial court could decide to suspend the entirety of the defendant's Class A misdemeanor sentence. Indiana Code Section 9-30-5-15(b), however, would prevent the trial court from doing so and would require the imposition of at least a ten-day executed sentence. There are other possible scenarios in which a defendant who has committed his third OWI may be convicted of only a misdemeanor as opposed to a Class D felony.

Section 9-30-5-15(b), therefore, is not irreconcilably in conflict with Section 35-50-2-2(b)(4)(Q), because it operates to require a minimum term of imprisonment in situations where the General Suspension Statute is inapplicable. . . .

. . . .

BAKER and VAIDIK, JJ., concurred.

CIVIL LAW ISSUE

McGARRITY v. BERLIN METALS, INC., No. 45A03-0109-CV-303, ___ N.E.2d ___ (Ind. Ct. App. Aug. 6, 2002).

KIRSCH, J.

> Does Indiana law recognize a tort claim for wrongful termination where a corporate financial officer is discharged for refusing to certify false financial and tax records?

. . . .

McGarrity claims that his employment was terminated for refusing to be a party to an illegal, fraudulent scheme of underreporting tax liability. Absent a set term of employment, an employment relationship is at will. [Citations omitted.] However, our supreme court has recognized some limited exceptions to the employment at will doctrine. [Citation omitted.] For instance, courts recognize a cause of action for retaliatory discharge when an employee is discharged solely for exercising a statutorily conferred right. [Citation omitted.] Also, an at will employee allegedly fired for refusing to commit an unlawful act for which he would be personally liable may bring a cause of action for wrongful discharge. [Citation omitted.] . . .

. . . .

[M]cGarrity was terminated not for refusing his employer's command to violate public policy. Rather, taking the facts in the light most favorable to McGarrity, he was fired for refusing to incur personal liability for felony fraud, filing a fraudulent tax return, failing a corporate responsibility, or a conspiracy to commit any of the former crimes. . . . McGarrity does not ask us to extend the exception to the at will employment doctrine by "borrowing" someone else's cause of action. Instead, it is McGarrity himself who was terminated for his refusal to join in BMI's conduct.

BMI also argues that there is no causal link between McGarrity's position regarding the personal property tax assessment and his termination. . . . Our review of the record discloses that prior to the decision to terminate in 1994, McGarrity had already expressed his disapproval of BMI's tax reporting approach and had voiced his refusal to cooperate. . . . Further, while BMI did offer legitimate reasons for McGarrity's termination, McGarrity's evidence created a factual question regarding the company's actual motives for terminating his employment. The question of the existence of a retaliatory motive for a discharge is a question for the trier of fact. [Citation omitted.] Accordingly, the issue should have been decided by the jury. The trial court erred in granting a judgment on the evidence on McGarrity's claim for wrongful termination and his claim for punitive damages.

. . . .

BARNES and MATHIAS, JJ., concurred.

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